(4)

Filed 11/13/2006

No. 06-513

In The Supreme Court Of The United States

Marc C. Houk,

Petitioner,

v.

George T. Franklin,

Respondent.

On Petition for Writ of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

Response Opposing Petition for Writ of Certiorari

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Argument

It is a well-settled rule in the Sixth Circuit that a constitutional violation based on ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), is sufficient to establish both cause and prejudice to excuse procedural default of a habeas petitioner's federal claim under *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See, eg., Franklin v. Anderson*, 434 F.3d 412, 418 (6th Cir. 2006); *Lucas v. O'Dea*, 179 F.3d 412, 418-19 (6th Cir. 1999); *Gravley v. Mills*, 87 F.3d 779, 785-86 (6th Cir. 1996).

The Warden petitions this Court to resolve a claimed circuit split over the issue of whether the requirement under *Sykes* to demonstrate prejudice is greater than proof of prejudice under *Strickland*. Respondent's Petition at 9-13. The Warden asserts that Franklin should have been required to demonstrate actual prejudice under the *Sykes* test before the procedural default of his biased juror claim on direct appeal could be excused. Respondent's Petition at 15-19. And the Warden complains that the remedy chosen by the Sixth Circuit — a new trial resulting from the service of a biased juror — would not have been available to Franklin if the Sixth Circuit had required him to demonstrate actual prejudice under *Sykes*. Respondent's Petition at 13-15.

But the result reached by the Sixth Circuit would not vary even if the *Sykes* prejudice test required more than a showing of prejudice under *Strickland*. Franklin demonstrates prejudice under any view of *Sykes* because his trial was made fundamentally unfair by a constitutional error that can never be harmless.

The Warden's "choice of remedy" complaint fails as well. Franklin won a new trial on habeas because his state court pleading that alleged ineffective appellate counsel under Ohio R. App. P. 26(B) [hereafter, 26(B) application] also alleged a separate Sixth Amendment biased

juror claim. The Warden perceives a false interplay between the Sixth Circuit's choice of remedy and his claimed distinction between the *Sykes* and *Strickland* tests for prejudice.

The Warden, moreover, waived all of his procedural default arguments in the Sixth Circuit. At oral argument the Warden's former counsel asked the Sixth Circuit to decide Franklin's habeas appeal on the merits of his biased juror claim. Further, the Warden's "*Sykes* versus *Strickland*" argument was never advanced in either the district court or the Sixth Circuit.

The Warden also fails to demonstrate why the result reached by the Sixth Circuit on the merits of Franklin's claim was incorrect under that court's de novo review. This is not an AEDPA case that would require any special deference to the state court's decision under 28 U.S.C. §2254(d). The result reached by the Sixth Circuit is well-reasoned, fully supported by the record, and necessary to prevent an injustice to Franklin.

1. Franklin wins under any interpretation of the *Sykes* prejudice test.

Even assuming that the *Sykes* test for prejudice requires more than the test for prejudice under *Strickland*, that fine distinction is not important in this case. Franklin's 26(B) application asserted a claim based on the service of a biased juror (Patricia Arthur) during Franklin's capital trial. Franklin won habeas relief (a new trial) on the basis of his biased juror claim, after the default of his claim was excused through the ineffective assistance rendered by his appellate counsel. *Franklin*, 434 F.3d at 422-28. Franklin would be entitled to habeas relief under any view of the *Sykes* prejudice test, however. The record establishes that this "trial was infected with constitutional error." *Franklin*, 434 F.3d at 417 (citing *United States v. Frady*, 456 U.S. 152, 169 (1982)).

"The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." *Id.* at 428 (quoting *Hughes v. United States*, 258 F.3d 453, 463 (6th

Cir. 2001) citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000)). The service of a biased juror "cannot be harmless" error. *Id.* (citations omitted). The service of a biased juror on Franklin's jury "infect[ed] the entire trial process, *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and necessarily render[ed] [this] trial fundamentally unfair.... [Franklin was denied] basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ...." *See Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)) (internal quotation marks omitted). Prejudice under the *Sykes* test is easily established here because the service of a biased juror rendered Franklin's entire trial fundamentally unfair. *See id.*; *Franklin*, 434 F.3d at 428 .

Although Franklin was not required to prove actual prejudice regarding the merits of his biased juror claim, *id.*, the service of a biased juror in this case is sufficient to demonstrate actual prejudice under *Sykes* nonetheless. This Court has made clear that "[t]he cause and prejudice requirement shows due regard for State's finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (quoting *Strickland*, 466 U.S. at 697). *Accord*, *Neder*, 527 U.S. at 8-9 (citing *Rose*, 478 U.S. at 577-78). This Court in *Frady* also emphasized that a showing of actual prejudice to excuse procedural default is made where the habeas petitioner's "entire trial" is infected with "error of constitutional dimensions." 456 U.S. at 170. And in *Murray v. Carrier*, this Court reasoned that "a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." 447 U.S. 478, 494 (1986). *See also, Franklin*, 434 F.3d at 417 (citing *Frady*, 456 U.S. at 169).

Franklin prevails under any interpretation of the *Sykes* test for prejudice. The "entire conduct of [his] trial from beginning to end . . ." was made fundamentally unfair by the service of a biased juror. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (citations omitted). The constitutional violation in Franklin's case is precisely the type of error that implicates the core concern of habeas review identified by this Court in *Haley*, *Frady*, and *Murray*.

But even if the service of a biased juror would not necessarily satisfy a habeas petitioner's need to show actual prejudice under *Sykes*, the outcome in Franklin's case would still be the same. Franklin can demonstrate case-specific prejudice. As the magistrate judge reasoned in his report recommending relief on Franklin's biased juror claim:

> [T]he Court notes that Juror Arthur executed an affidavit in April, 1993, in which she stated, among other things, that it seemed to her that Franklin's lawyers "should have done more to prove that George was not guilty" and that the defense counsel "should have brought out more evidence to help George." (Return of Writ, Doc. No. 15, Exhibit X at P.7.) Arthur indicated that had the defense done so, she might have voted against Franklin's conviction. *Id.* While it is true that Ms. Arthur also stated she voted for conviction in response to alleged pressure by the other jurors, she leaves no doubt that her fundamental misconception of the burden of proof at trial remained firmly entrenched after the trial judge's repeated attempts to rehabilitate her during voir dire and after the jury view, through Franklin's trial unaffected by the jury instructions, and into 1993 when she executed her affidavit. **Therefore, even if Franklin were required to show prejudice ... from the trial court error and the ineffectiveness of his trial and appellate counsel concerning the seating of a biased juror, he could likely do so.**

Magistrate's Report and Recommendation, reprinted in Appendix to Warden's Petition at 205a (emphasis added).

The Sixth Circuit found that appellate counsel's prejudicially deficient performance satisfied Franklin's burden to establish both cause and prejudice to obtain a merits review of the biased juror claim on habeas. *Franklin*, 434 F.3d at 431. Franklin would, however, satisfy the test for prejudice under any interpretation of *Sykes*. His trial was infected by constitutional error. Simply put, it would be a waste of this Court's resources to grant the Warden's petition. *Cf.*

Freeman v. Lane, 962 F.2d 1252, 1259, n.5 (7th Cir. 1992) ("It is an open question whether this finding of prejudice would also be sufficient to establish 'prejudice' for the purpose of Wainright v. Sykes' cause-and-prejudice analysis....We need not decide this question here, however. Assuming arguendo, that the standards for prejudice under *Strickland v. Washington* and *Wainwright v. Sykes* (as interpreted in *United States v. Frady*...) are distinct, we find that the error committed in Mr. Freeman's trial and appeal satisfied independently either standard.").

2. The remedy does not change under a different interpretation of *Sykes* prejudice.

The Sixth Circuit ruled that Franklin was entitled to a new trial on his biased juror claim; a claim that was presented to the Ohio court of appeals in Franklin's 26(B) application. *See* 434 F.3d at 431. The Warden complains that the Sixth Circuit's finding of prejudice under *Strickland* resulted in a new trial as the remedy on habeas — rather than the remedy of a new appeal — because an additional showing of prejudice under *Sykes* was not required. This complaint is illusory since the Sixth Circuit's choice of remedy did not hinge on the Warden's manufactured "*Strickland* versus *Sykes*" controversy.

In the Sixth Circuit a habeas petitioner may obtain relief by either a new trial or a new appeal when a meritorious constitutional claim is first presented to the state courts by the habeas petitioner's 26(B) application. The choice of remedy in the Sixth Circuit does not depend on whether that court equates a showing of prejudice under *Strickland* to a showing of prejudice under *Sykes*. Rather, the choice of remedy depends on the specific manner in which the habeas petitioner pleaded his 26(B) application in the Ohio court of appeals. A comparison of several Sixth Circuit cases addressing 26(B) motions in capital cases demonstrates that the Warden's "choice of remedy" complaint is hollow.

In *Lott v. Coyle* the habeas petitioner presented various claims alleging constitutional violations in his 26(B) application in the Ohio court of appeals. 261 F.3d 594, 601 (6th Cir. 2001). The Sixth Circuit found that Lott's claims were procedurally defaulted. *Id.* at 607. The Sixth Circuit reasoned that Lott's 26(B) application raised "only the ineffectiveness of his appellate counsel" and "[a]t no point did [Lott's 26 (B) application plead] the discrete [trial error] claim ...." *Id. Accord Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004) ("The only *holding* of the district court is that 'Mapes did not receive the effective assistance of appellate counsel.... Thus, the only constitutional violation properly before us is the ineffective assistance of *appellate* counsel, the appropriate remedy is the one granted by the district court, that is, a writ conditioned upon Ohio courts granting a new, direct appeal.") (emphasis in original).

A different result was reached by the Sixth Circuit in *Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005), *rev'd on other grounds*, *Bradshaw v. Richey*, 546 U.S. 74 (2005). In *Richey*, the Sixth Circuit granted habeas relief on a discrete trial error claim (insufficient evidence to prove Richey's intent to kill the victim). *Id.* at 674-77. What is significant about the *Richey* case for this discussion is that the Sixth Circuit reached the merits of Richey's trial error claim because it was presented to the Ohio court of appeals through his 26(B) application. *Id.* at 679.

As in *Richey*, and unlike in *Lott* and *Mapes*, Franklin's 26(B) application pleaded a claim of ineffective appellate counsel plus a discrete Sixth Amendment claim alleging the service of a biased juror. The first assignment of error in Franklin's 26(B) application alleged a due process violation based on ineffective appellate counsel. *See* Sixth Circuit Joint Appendix, vol. 5 at 4007. In Franklin's second assignment of error he asserted a discrete Sixth Amendment claim based on the service of a biased juror: "Mr. Franklin's convictions and sentences must be reversed because the service of a biased juror violated his right to trial by a fair and impartial jury and to

due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution." *See* Sixth Circuit Joint Appendix, vol. 5, at 4020. Contrary to the Warden's assertion, the "*Sykes* versus *Strickland*" prejudice question did not determine the Sixth Circuit's choice of remedy in *Franklin v. Anderson*.

And the Warden concedes that a new trial may be the proper remedy in some cases where ineffective appellate counsel is "used as a gateway to some underlying substantive claim...." Respondent's Petition at 14. This is such a case. Franklin won a new trial on habeas because he pleaded both a due process claim alleging ineffective appellate counsel and a meritorious Sixth Amendment claim in his 26(B) application.

3. The Warden's default arguments are waived.

This Court should not accept the Warden's "*Sykes* versus *Strickland*" question for review because the Warden's counsel asked the Sixth Circuit to reach the merits of Franklin's biased juror claim during oral argument. *See* Affidavit of Respondent's Counsel, Appendix at A-1. The position taken by the Warden in his petition for certiorari is thus "irreconcilable with [the position taken by the Warden's counsel at oral argument]" and so the Warden should "not be heard to dispute it here." *See Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988).

The Warden's "*Sykes* versus *Strickland*" argument, moreover, should be deemed waived because it was not raised in either the Sixth Circuit or the district court. During these habeas proceedings the Warden argued on other grounds that Franklin's biased juror claim was defaulted. Now the Warden argues for the first time in his petition to this Court that Franklin should have carried a greater burden to demonstrate prejudice under *Sykes*. *See Franklin*, 434 F.3d at 417-21 (discussing procedural default question, but not discussing "*Sykes* versus *Strickland*" prejudice question); *Id.* at 431-32 (Batchelder, J., dissenting) (arguing biased juror

claim was defaulted; but dissent did not address issues of whether Franklin failed to make a sufficient showing of prejudice under *Sykes* test). *See also,* Amended Supplemental Report and Recommendations, reprinted in Appendix to Warden's Petition at 342a-355a ("*Sykes* versus *Strickland*" question was not raised in Warden's objections to magistrate judge). This issue is waived because it was not presented below.

4. Franklin is entitled to the writ of habeas corpus on his biased juror claim.

The Warden's petition should be denied because Franklin's trial was rendered fundamentally unfair by the service of Patricia Arthur. The voir dire transcript establishes that Arthur steadfastly maintained her belief, contrary to law, that Franklin had to testify or otherwise produce evidence of his innocence before Arthur could ever acquit him.

In voir dire the prosecuting attorney asked "[n]obody wants George to say anything?" Arthur replied: "To prove he's innocent." Sixth Circuit Joint Appendix, vol. 2, at 1021. The trial judge then attempted to correct Arthur's misunderstanding of the law. *Id.* at 1022. But when later questioned by defense counsel, Arthur made this telling comment: "I believe that he should bring himself out, if he didn't do it, just testify, tell what happened, you know." *Id.* at 1097. Arthur then explained her belief that Franklin had a burden to prove his innocence: "[E]ven if the evidence is not against him, that they have brought evidence to find that he's not guilty." *Id.* at 1099.

Again and again, Arthur made similar statements that raised serious, unresolved doubts about whether she could set aside her beliefs and follow the law. Four times the trial judge tried to set Arthur straight by explaining that her beliefs were contrary to the law. *Id.* at 1022, 1097, 1098, 1099-1100. The judge's repeated attempts to rehabilitate Arthur failed, however. *Franklin*, 434 F.3d at 427-28.

After the judge's final attempt to set Arthur straight at voir dire, her bias resurfaced within the context of a completely different line of questioning. When defense counsel sought Arthur's views on the death penalty, Arthur revealed her inability to be rehabilitated with this telling statement: "Well, what I consider to be the right thing is if justice is done, either way. If he's proven guilty, then justice is done. **If he's proven not guilty then justice is done.**" Sixth Circuit Joint Appendix, vol. 2, at 1107-08 (emphasis added). Those were Arthur's last words on the subject, and no attempt was made by the trial judge to rehabilitate her after that statement was made.

Accordingly, the Sixth Circuit was correct to find that a biased juror was empanelled in Franklin's capital trial. *See* 434 F.3d at 427-28 (citations omitted) ("Even after [Arthur] was corrected three times by the judge, she still insisted with her last statement that the defendant had to be proven innocent.... While we appreciate the judge's attempts to rehabilitate this juror, he had a duty to dismiss a prospective juror who could not follow the law.... As such, the trial court's failure to dismiss [Arthur] constituted manifest error and does not merit the presumption of correctness normally due trial court fact findings...."). The Sixth Circuit also correctly determined that Arthur's service on Franklin's jury created a structural defect that requires a new trial. *See id.* at 428. And Franklin filed his habeas petition before the effective date of the AEDPA. *Id.* at 417. As this is a pre-AEDPA case, no special deference was owed to the result reached in the state court. *Early v. Packer*, 537 U.S. 3, 8 (2002).

5. Appellate counsel were ineffective during Franklin's appeal of right.

The job done by appellate counsel (Dieffenbach and Greenham) on Franklin's appeal of right was exceedingly poor and harmful to Franklin's right to due process on his appeal of right. *See, generally, Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel's neglect of duty, and

their embarrassing display of frivolity at oral argument before the Ohio Supreme Court, are well-documented in the Sixth Circuit's opinion. *Franklin*, 434 F.3d at 429-31. Appellate counsel neglected their duty to consult with Franklin, to keep him informed, to heed his request to withdraw from the appeal, and to advise him of his right to file a pro se brief to raise issues that Franklin himself identified — including the biased juror claim that was successful on habeas. (The Report and Recommendation issued by the magistrate judge sets out in painstaking detail appellate counsel's horrendous performance. *See* Report and Recommendation, reprinted in Appendix to Respondent's Petition at 296a to 325a.) Simply put, "[n]o client in his right mind would have paid one cent for such a performance." *High v. Rhay*, 519 F.2d 109, 113 (9th Cir. 1975).

Most important, however, was appellate counsel's failure to raise the winning biased juror claim on Franklin's appeal of right. This was an obvious issue, preserved for appellate review by trial counsel's mistrial motion, and this claim was even brought to appellate counsel's attention by Franklin. *Franklin*, 434 F.3d at 429-30. In view of this unjustified omission, the Sixth Circuit properly found that appellate counsel's ineffectiveness established both cause and prejudice under *Sykes* to excuse Franklin's failure to raise the biased juror claim on direct appeal. *See id.* at 431.

And the Warden's claim that Franklin manipulated the criminal justice system by filing his 26 (B) application is specious. *See* Respondent's Petition at 15-19. Franklin's trial counsel moved to strike juror Arthur from the panel after a view of the crime scene. Sixth Circuit Joint Appendix, Vol. 2 at 706. Then on appeal, Franklin identified the winning biased juror claim in a letter to his counsel. *Franklin*, 434 F.3d at 429-30. But appellate counsel did nothing to redress this constitutional error. *See id.* Accordingly, Franklin had no recourse but to raise this Sixth

Amendment violation by his 26(B) application. It was hardly a matter of manipulation or gamesmanship by Franklin for him to expect a fair trial — and competent representation on his appeal of right — and then to seek available state remedies when those rights were denied him.

Conclusion

There are no "compelling reasons" to grant the Warden's petition. *See* Supreme Court Rule 10. Franklin would demonstrate prejudice under any interpretation of the *Sykes* test to excuse procedural default. Franklin's entire trial was rendered fundamentally unfair by a constitutional error that can never be harmless. Further, the reasons for review advanced in the Warden's petition were not presented to either the district court or the Sixth Circuit — and the Warden's counsel at oral argument asked that court to reach the merits of Franklin's biased juror claim.

The Warden's petition for certiorari should be denied.

Respectfully submitted,

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Affidavit Of Respondent's Counsel In Support
Of Response Opposing Petition For Certiorari

County of Franklin,

State of Ohio, ss:

1) I, Joseph E. Wilhelm, affirm that the following is true:

2) I was appointed by the Sixth Circuit under the CJA to represent Respondent George Franklin. I argued Mr. Franklin's habeas appeal in the Sixth Circuit on March 17, 2005.

3) Assistant Attorney General Heather Gosselin argued this habeas appeal on behalf of the Warden in the Sixth Circuit.

4) At oral argument I spent a considerable amount of time asserting that Mr. Franklin's 26(B) Application (alleging ineffective appellate counsel) was not procedurally defaulted.

5) On rebuttal, Chief Judge Boggs asked Ms. Gosselin what her response was to my arguments regarding the procedural default issue.

6) In reply to Chief Judge Boggs's question, Ms. Gosselin asked the Sixth Circuit to decide the habeas appeal on the merits of Mr. Franklin's biased juror claim. The biased juror claim was raised in state court in Mr. Franklin's 26(B) application.

7) I considered Ms. Gosselin's answer to be a major concession by the Warden on an important procedural issue in the habeas appeal. Accordingly, her answer stayed in my mind after the argument because of the significance I placed on it.

8) After I was served with the Warden's petition, I immediately realized that the Warden's new counsel was arguing procedural default in a manner that seemed to me to be wholly inconsistent with Ms. Gosselin's answer to Chief Judge Boggs's question.

9) I therefore purchased a cassette tape of the oral argument in this case from the Clerk of the Sixth Circuit on October 12, 2006. (A receipt for the purchase of this cassette tape is appended to my response opposing the Warden's petition.)

10) I had the oral argument cassette tape transcribed so I could append it to Mr. Franklin's Response Opposing Certiorari in this Court. My purpose for obtaining the argument transcript was to demonstrate to this Court that the Warden's position on certiorari is inconsistent with his counsel's position at oral argument in the Sixth Circuit.

11) Unfortunately, the oral argument cassette tape that I received from the clerk stops before Ms. Gosselin answered Chief Judge Boggs's question during the Warden's rebuttal argument.

12) The transcript of the cassette tape produced only seventeen pages of transcript from an hour long argument.

13) I am appending this affidavit in lieu of Ms. Gosselin's answer to Chief Judge Boggs's question on procedural default during the Warden's rebuttal argument in the Sixth Circuit.

14) A copy of the partial oral argument transcript from Mr. Franklin's habeas appeal is appended to my response in opposition to the Warden's petition.

JOSEPH E. WILHELM

Sworn to and subscribed before me this 13th day of November 2006.

NOTARY PUBLIC

BRENDA L. JONES
Notary Public, State of Ohio
My Commission Expires 9-24-2010

246292

(Bailiff) Arnold S. Anderson, Warden vs. Warren G. Franklin. (Inaudible) is presided. Judge Joslin with the appellate cross appellee.

{Judge} You may proceed.

{Counsel} Thank you Your Honor. Good afternoon. May it please the court and Counsel, my name is Heather Doslin. And I will be arguing today on the behalf of the Warden, State of Ohio. With the courts permission I would like to reserve ten minutes of your time.

{Judge} You may.

{Counsel} Thank you Your Honor. Mr. Franklin was convicted for the 1988 murder of Gerald Straus and sentenced to death in Hamilton County in 1989. Fourteen years later, the District Attorney stated that of all the convictions sentenced based on two issues for instance (Inaudible) petition. First acclaimed that one juror, uh that - - that juror being Patricia Arthur was a bias juror and second acclaimed that his Direct Appeal Appellate Counsel were ineffective. And when respectfully submitted to the District Court error and (Inaudible) petition of leave on each of these issues and asked this honor - - Honorable Court to reverse the District...

{Judge} I take it those two issues are not independent in the sense that either one of them standing alone, would not uh - - would not bring relief, is that your view?

{Counsel} You believe that either one alone did I believe (Inaudible)?

{Judge} For the to - - to for the - - for the opposition that is to say if - - if the counsel was generically ineffective in the Strickland effectiveness sense but there was no valid issue to prevail on there wouldn't be relief. And again, conversely if the Juror potentially, at least was bias but if counsel had been effective at every stage then their procedural default might apply...that's simply the way I was looking at it.

{Counsel} And that is correct.

{Judge} I mean we'll see whether your adversary agrees but that was my initial analysis.

{Counsel} That is correct. Um, and I would like to begin uh with the issue of the bias juror claim. And I know you just uh mentioned procedural default the District Courts did find common prejudice for the procedural default and then went to direct (Inaudible). And I believe that the most troubling issue is the fact that the court granted on (Inaudible) merit and that's what I would like to spend um at least a - - a part of my argument here today, arguing before you. This issue is one of credibility and the trial court was in the best position to assess juror verse credibility. The trial courts

believe that Ms. Arthur could be fair and impartial is entitled to a conjunction of correctness that can only be up over compact hearing remaining evidence. And the District Court looked at three different area. They looked at statements that she made out of Voir Dire, statements that she made during a jury review and after they had typically provided in post conviction, which had it the claim had been based on direct appeal would not have been um obviously part of that record. With that, we now properly be before that court. Um, the issue first began in general Voir Dire. Defense counsel stood up in general Voir Dire and asked a question like we do, probably in many if not all cases, um criminal cases that being whether anyone believes that the Defendant should get on that stand and testify and tell his side of the story. At that point, three jurors raised their hand and indicated that they believe the defendant should take the stand to prove his innocence. Juror Arthur being one of those. Um, at that point the Judge stepped in and explained to uh the veneer panel what the law was in fact that the State held no burden of proof and the Defendant did not need to take the stand. Um, I think he had. They asked - - the court then asked if the jurors could accept that and the record doesn't indicate that those three jurors said anything and the Judge just says okay and they move on. Now we've fast-forwarded time. General Voir Dire in the morning, in the afternoon they come back

for individual Voir Dire on the death penalty qualification component. And first the Prosecutor stands up to start um inquiring and the - - in regards to Juror Arthur, she was asked um the statement that would say, if whether or not she understood that the state had the burden of proof on each and every element and would hold the state to that burden of proof. She indicated that she would. He then moved on to issues of the death penalty and he said, "If the State finds this Defendant guilty beyond a reasonable doubt, could you find him guilty knowing that the death penalty could be a possible penalty?" She repeatedly couched her answers with "if he's proven guilty", she wouldn't just say yes, she said, "If he's proven guilty". The Defense or I'm sorry, the State sits down, the defense gets up with individual Voir Dire. He goes back to her statement in general (Inaudible) that morning about whether or not um; he believed that she, that the defendant was required to prove his innocence. Ms. Arthur stated that she believed that it was her opinion, that he should tell what happened At that point the Judge again instructed and this is what's interesting in that it was individual Voir Dire when the rest of the veneer was actually in the courtroom. So, he kind of gave us the same general instruction again to Ms. Arthur, to us, to the rest of the veneer as well. Um, he explained the law. And he asked if she understood the law. She said that she did. And then, he said um, he asked if she would hold

it against - - if she would hold it against the defendant if he doesn't produce anything. And, if she would not do that and she responded, "I guess so, if that's the law". Now, at that point and time I turned it back over to the defense counsel, defense counsel was not comfortable with that answer of, "I guess so". So he went on to further inquire, um let me just read a little bit, a portion of that transcript and I'm reading from appendix pages 1100 and 1101. "Question: If we were to try a case in the State turned on evidence and George didn't take the stand would you hold that against him? Answer: No. I wouldn't hold it against him. Question: Would you think that would have something to do with his guilt? Answer: No. Question: You wouldn't think you, wouldn't consider that at all? Answer: No, I wouldn't. At that point and time defense counsel moved on with individual questioning um, on the issue of death penalty qualification ultimately um both sides passed Ms. Coughlin, she sat on the jury. Now the fact that Ms. Arthur initially held an opinion, said the Defendant should testify or should want to tell the jury what happened and responded with an "I guess - - I guess so " is not clear and convincing evidence (Inaudible).

{Judge} You mention that again I was gonna ask you about it anyway so that's uh a good lead in.

{Counsel} Okay.

be the right thing. Well...I consider the right thing as a justice is done either way if he's proven guilty, the justice is done. If he's proven not guilty then justice is done. And, Magistrate Judge Mers says well that's - - that's the final wrap up and it still looks like she thinks one side or the other has to prove there's no middle - - middle way. What do you make of that?

{Counsel} I make of that as being an issue of semantics with a lay person. What I take from that of first day proven guilty or proven not guilty is she doesn't have a proven condition that client is guilty whether she comes to the court with an open mind and she...

{Judge} Well if she comes with an open mind um I'm - - I'm willing - - I'm willing to give her that she - - that she comes to court with an open mind as between the two sides. But the problem we face is there's certainly a fair amount of indication that she - - she's really not a - a with the program on - -on who wins if uh - - if neither side proves their case. That is, she seems to say one side or the other has to prove it and that's rather contrary to the - - to the presumption of innocence and the burden on the prosecution. So that - - that's what we're trying to deal with. Isn't it?

{Counsel} That's true, um but I mean you need to look at everything in the complete context of all - - of all her answers. Um jurors are constantly saying either you know they're - - they're uh mistaking the laws as far as you know who proves what. I just had a capital

child at the end of last year and jurors were constantly getting confused with the burden of proof in the litigation phase of the trial. Did the State have the burden of proof but the Defense had the burden of going forward and if Defense doesn't present anything then what happens. And jurors were constantly, you know, expressing concerns well you have to prove to me that the death penalty is not warranted but when questioned them further they - - they grasp that concept. The concept of the State having the burden of proof it was just you know, merely semantics and them thinking well, if the State proves the aggravating circumstances and the Defendant doesn't prove anything you know, they prove anything - - then clearly - - then clearly they outweigh. And I think if you look at the entire um uh appendix you know, all together that becomes clearer and those - - those (Inaudible) just doesn't happen uh Your Honor to be appendix volume II, pages 1020-1023, 1085...(inaudible)

{Judge} I'm sorry these are pages of what, the Voir Dire?

{Counsel} I'm sorry. The Voir - -

{Judge} (Inaudible) I'm - - I'm familiar with that.

{Counsel} Okay. If (Inaudible) if you - -if you are done with that. Um, the other thing is that I would say on that is moving to the issue of what happens at the jury veto. She's ultimately seated on the jury obviously and they have a jury veto and when she's shown the

Gerald Strauss apartment she said, "Either was that the window he got in or where did he break in", and they come back, they bring her in to chambers. They question her on the record with what she means by that. They again ask her if she'll keep an open mind in this case and wait until she hears all the evidence. She again says um that she will, um and keeping this in mind it's important to remember the logistics of a jury view. I think jury views can be very useful but I think they can also be very confusing. Jurors attend the jury view before they know anything about the case at this point and time all she knew is that he'd been charged with aggravated murder and two aggravated burglaries. Um...

{Judge} Let me ask you one thing about the jury view. The Judge did not accompany the jury out there to the jury views, is that right?

{Counsel} I believe so, that's correct.

{Judge} Is there any uh problem uh in the case law regarding whether uh the jury should view the scene um without the supervision of the court or - - or without supervision of the Judge or as to what kind of supervision the jury should be under when it goes to view a scene such as that?

{Counsel} Your Honor, I can't state to you to an actual case name, but my understanding is that the jury is in the supervision of the courts in the general sense of the trial. And it would be a bailiff typically, with a bailiff or somebody else who works for the Judge. And they

um, they go under oath. They take an oath before they do that and so that they are you know, in care or custody of somebody that means the bailiff, and then the bailiff uh report- - reports back to the court with any problems. Defense counsel and the Prosecutor were there and that's why this issue were raised, and they were in chambers in the discussion talking about what happened. Everybody apparently agreed if you - - if you actually read those pages uh the juror said what she said. And, Defense Counsel and the Prosecutor agree with the statement that was actually made. And the point that I wanted to make there, is just that she - - she uh that meant she was saying, she indicated that all she knew at that point was that he had - - they had, she had been told that he burglarized two places. And she needed to know if those were the two houses, the two apartments, the two places. So, she...

{Judge} When - - when says she had been told by that time, by the time that the view had there been testimony uh to that affect or was the view before testimony was taken?

{Counsel} The view was before testimony was taken however when they first brought them in that morning for Voir Dire the Judge ranked the indictment.

{Judge} Okay.

{Counsel} That being aggravated murder.

{Judge} And the indictment covers both burglaries?

{Counsel} That is correct. That is correct. I mean in the interest of time, I think I better move on to the second issue, which is the um in effect of assisted of Appellate Counsel. Um, here the District Court found the appellate counsel were ineffective for three reasons. For failing to consult with their client. Or failure to provide (Inaudible) with an opportunity to provide input to appellate counsel. And then for raising the claim that we just talked about. That means the juror bias claim.

{Judge} For that reason?

{Counsel} For that reason. I- - I'm sorry if I misspoke. Um, here the question becomes we already talked about (Inaudible) but here the question becomes were appellate counsel ineffective for not raising it as an issue? Um, obviously the United States District Court in the Jones v. Barns Case stated that experienced advocates at the time in memory (Inaudible) have emphasized the importance in handing out equal arguments on appeal and focusing on one central issue if possible or at most on a few key issues. And this Honorable Court and the Meis requital Case listed eleven questions that kind of helped you answer that - - that question um, were the admitted issues significant and obvious? Were there arguably contrary (Inaudible) on the admitted issues? Were the admitted issues clearly stronger than those presented?

{Judge} So what - - what were the stronger issues that they did present? Because it seems to me that all the issues that were, that in fact were presented by these appellate counsel have all disappeared by now. Most of the - - most of the cases that we've had, you know, somebody has four strings to their bow and they're still pushing three of them and the fourth one's defaulted. And then they try to you know play ineffectiveness to bring in the fourth one but you know, this clearly now is their lead issue and it's the one they prevailed on um so you know, put yourself in their shoes. Why are the ones that they did raise uh, adequate or superior to this one?

{Counsel} Well they - - they raised uh, six issues. One of those issues being trial courts denial of motions that (Inaudible) went into affect from the Strauss affect and that means the two aggravated burglaries. I believe that that would be the strongest argument because the jury heard evidence about one burglary and then they heard evidence about another burglary that ultimately led to murder. The Prosecutor of course um, you know was saying that they were related and that there were similarities.

{Judge} But they would've been able to introduce virtually all of that evidence as similar acts evidence, wouldn't they? M. O. I mean that -- that's why we - - we usually at least all the cases that I have been on we rejected severance um...

{Counsel} I - - I think you're probably right. I'm trying to think of what all the similarities were with the you know, similarities...

{Judge} With the window tearing, cutting the uh - - cutting the hole to get in the window. Taking certain types of electronic property. Same neighborhood...

{Counsel} Right, right.

{Judge} What, two weeks apart? Something like that.

{Counsel} Um, seventeen days I believe.

{Judge} Okay.

{Counsel} Um, going back to the questions the - - the um, trial counsel passed on cause time um the bias juror claim and the trial Judge didn't find the um, the juror to be bias. So if the appellate counsel were to raise this issue on appeal; first of all it would be the court of appeals would be looking at it for plain error review. They would be um looking at the same credibility determination that the District Court should have been looking at and that this court will certainly look in providing deference to the trial Judge who was the one that was actually there observing all of this. Um, so those are the types of things that counsel needs to take into consideration when they are raising these issues. It's also important to note that counsel, you know, there are two counsel on - - on a case - - on a direct appeal case that Dusselhoff and Broomhale (Inaudible) they agree, they consulted with both trial counsel. They consulted with

the trial judge and they also consulted with another local attorney, (inaudible), in the Cincinnati area who had a significant capital case and criminal experience. As well as with a friend, who was also an attorney, a friend of Franklin's who was also an attorney uh Richard Arnold. So they consulted with all of those people um, this court should also look at...

{Judge} Consulted on what issue, issue, or issues?

{Counsel} I'm sorry.

{Judge} Consulted on what issue are you referring to?

{Counsel} They - - they read the record, they got the documents, they read the record they sat down with counsel and said what do you think on the issues on appeal. They said something to the trial Judge and said what - - what do you think. This um...

{Judge} So they were consulting on what issues to raise not so much the ethicacy of each they – they - - not how do I argue this issue?

{Counsel} Right. Just - - with - - no you as the trial counsel, what do you think is the strongest issue on appeal. You, as the trial judge, what do you think. This Richard Arnold, who's a friend of Mr. Franklin's, um, he actually attended the entire trial and then ultimately testified in litigation as well. So they consulted with him, they consulted with other people who had experience. They consulted that experience. Um, Ms. (Inaudible) had ten years of

experience um and she said about fifty to sixty percent of her practice was in the criminal (Inaudible).

{Judge} Well how much of that was on capital cases?

{Counsel} They each had um both counsel had done one capital case before (Inaudible) capital case. But the issue of juror bias is a criminal; straight criminal issues not anything that's special, um to capital cases. We'll talk about that probable qualification, it's just kind of Voir Dire in general.

{Judge} Thank you counsel your time has expired. Just a quick procedural question...I - - I won't come out of your time. I noticed that in the - - in the District Court proceedings it seemed that the case moved to an evidentiary hearing fairly promptly and then there was like a five year hiatus between that and the rendering of the appending is there any reason for that? Either in the record or from the surrounding circumstances that you know of?

{Counsel} Um, I am - - I am not aware of any uh actual reasoning for that without stating - - stating my age that is actually once I went to a hearing uh before...

{Judge} Thank you.

{Counsel} Came over from...(Inaudible)

{Judge} Thank you. Thank you. Okay. Thank you, ma'am.

{Counsel} Thank you.

{Judge} We'll have your ten minutes for rebuttal.

(Counsel II) Thank you Your Honor. May it please the court um, the District Court - - the District Court's grant of the - - on Mr. Franklin's sixth amendment violation to be affirmed. The Magistrate's uh report and recommendation was a signal to throw and the reading of the record by the Magistrate is correct, as I'il demonstrate. The first words out of this Juror Arthur's mouth in Voir Dire were in response to a group questioning by Mr. (inaudible). Mr. (inaudible) uh asked the question does anyone require uh Mr. Franklin to take the stand and testify on page, I think it's 171 of the trial transcript. The Juror said, "I do, I require him to testify to prove his innocence". Now, at this point the trial judge gives a proper explanation of the law and sets up the standards that Mr. Franklin has no burden what so ever. Despite this fact we go through uh an extremely tortured long one year where the Juror can quit the case whenever she indicates that maybe she (mistake) the law. She made seven total unequivocal statements on the record convincing her bias. Six of those opinions were after she was given one instruction by the Judge what the law was. Four times, she expressed a bias opinion after she received two instructions from the Trial Judge on what the proper law was. Three times, she gave bias opinions thinking that Mr. Franklin had proved his innocence or produced evidence to establish his innocence after she received three instructions on what the law was

by the Trial Judge. And then, finally, after the fourth instruction from the Trial Judge on that Mr. Franklin has no proof, he's not required to do anything. The juror still after getting four instructions from the Trial Judge on explaining the law that Mr. Franklin had no burden of proof, no burden of production, the juror still made two bias statements. And the last one...

{Judge} When you say bias statements, let me ask you cause this is to me kind of the crutch of the case...

{Counsel II} Yes, Your Honor.

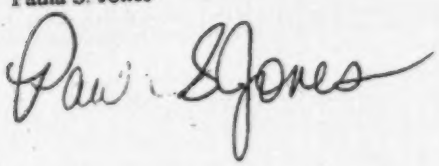
{Judge} Most of the cases, maybe even virtually all of the cases that talk about bias jurors, talk about in the con- in the context of having something against....

END OF TAPE

November 9, 2006

I, Paula S. Jones, do hereby certify that the information contained in this transcript has been transcribed to the best of my knowledge and the best of my ability.

Paula S. Jones



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